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20-P-1175

Appeals Court

COMMONWEALTH vs. ELIZABETH GEBO.

No. 20-P-1175.

Hampden. April 13, 2021. - June 29, 2021.

Present: Meade, Wolohojian, & Massing, JJ.

Assault and Battery by Means of a Dangerous Weapon. Practice, Criminal, Trial jury-waived, Waiver of trial by jury. Constitutional Law, Trial jury-waived. Waiver.

Complaint received and sworn to in the Springfield Division of the District Court Department on July 26, 2017.

The case was tried before William P. Hadley, J.

Chrisoula I. Roumeliotis for the defendant.
John A. Wendel, Assistant District Attorney, for the Commonwealth.

WOLOHOJIAN, J. The primary issue in this case is whether the judge erred in denying the defendant's motion to waive her right to a jury trial. We conclude that he did, and that the error warrants vacating the defendant's conviction.

Background. The charges stem from a domestic conflict between the seventy-five year old defendant and her seventy-six year old husband of fifty-five years. The husband reported that, on April 20, 2017, the defendant became irritated because he had left shoes on the porch of their house. An argument ensued, and the defendant swung a plastic chair and struck the husband's arm. After a jury trial, the defendant was convicted of assault and battery by means of a dangerous weapon on a person age sixty or over, G. L. c. 265, § 15A (a).¹

A judge conducted a trial readiness conference approximately two weeks before the scheduled trial date. During the conference, the judge inquired whether the case would be tried to a jury. See Dist./Mun. Cts. R. Crim. P. 4 (e) (1996).² Defense counsel responded, "As of this point, yes." The judge replied, "Okay. Be subject to a motion when it's called for

¹ The husband also reported that the defendant hit him on the head with a ladle. However, the defendant was acquitted of the separate charge of assault and battery by means of a dangerous weapon based on the ladle. In addition, the Commonwealth filed a nolle prosequi on a charge of violating a G. L. c. 209A abuse prevention order.

² "When the pretrial conference report is submitted, the court shall examine it for completeness, shall rule on any disputed discovery issues, and, unless discovery compliance is still pending, shall inquire if the defendant waives the right to jury trial." Dist./Mun. Cts. R. Crim. P. 4 (e).

trial next week or in the future." There was no further discussion of the topic during the conference.

The parties next appeared for trial before the trial judge, who was not the same judge who had conducted the trial readiness conference. As soon as the clerk called the case, the clerk informed the judge that the defendant had filed a rule 19 (a) motion for relief from election of jury trial.³ The following exchange then took place:

The court: "Okay, and [the defendant] elected a jury trial previously?"

Defense counsel: "She had previously, Judge."

The court: "So what's the basis for waiving that at this point?"

³ As required by Mass. R. Crim. P. 19 (a), 378 Mass. 888 (1979), and Dist./Mun. Cts. R. Crim. P. 4 (e), the motion was made on a preprinted form of the trial court department, and it was accompanied by a waiver of jury trial form and defense counsel's certificate. The preprinted motion contained a list of possible bases for the motion. In this case, the defendant checked the box stating that "[s]pecific characteristics of this case have caused me to reconsider my original election," without giving any further explanation.

These preprinted forms, as amended, were promulgated by the District Court in response to the report and recommendations of the Supreme Judicial Court Working Group Regarding Procedures for the Waiver of Trial by Jury in the Boston Municipal Court and District Court Departments. See Memorandum from Chief Justice Paul C. Dawley (transmittal no. 1144), dated January 8, 2015; Report and Recommendations of the Supreme Judicial Court Working Group Regarding Procedures for the Waiver of Trial by Jury in the Boston Municipal Court and District Court Departments (March 28, 2013) (Working Group Report) 4.

Defense counsel: "Judge, we have consulted extensively today about the different options, and I understand we did not elect a jury waived trial on the 15th . . . I did speak with my client today again about what the different options were. I think given the facts of this case, given the time, context of this case, a jury waived trial is appropriate. I did go over the difference with my client and she believed given all the circumstances that she wanted a jury waived trial today."

The court: "Okay, well that really isn't a legitimate reason. I mean it's a legitimate reason as far as you're concerned, but lawfully under the current rules in Massachusetts there has to be a good cause and that does not amount to good cause."

Defense counsel: "I can only tell the court that I have attempted or on other occasions I have gone down to courtroom nine or courtroom 10 and been able to elect a jury waiv[ed] trial, given different circumstances so -- . . . [w]ith that understanding --"

The court: "Well, good for you. . . . My ruling is that's, that's not good cause under the standards for waiving a once elected jury trial. So that motion is denied. We have jurors and we will use them."

The prosecutor: "Judge, I would just say the Commonwealth does not object to a jury waived trial."⁴

The court: "I don't care. All right. I have to apply the law equally and that is not good cause. So the parties want a trial, you get a trial. It's going to be a trial in front of the jury. That is what was elected and to waive that on the day of the trial, part of the issue and I don't think it's me, but the issue of avoiding the appearance or the inkling of judge shopping, et cetera --"

Defense counsel: "And, there's no judge shopping here --"

⁴ Although it was not necessary in this case because the Commonwealth volunteered the information, we note that the better practice is for the judge to elicit the Commonwealth's position on the waiver before ruling. See Working Group Report, supra at 4.

The court: "It's done, it's done. I'll note your objection. I'll note the Commonwealth's objection if you want to, but we have jurors here today, it's a jury trial."

The judge then requested that twenty-five members of the jury pool be sent up to the court room. Once that occurred, the Commonwealth moved for trial. At this point, defense counsel requested a sidebar conference to inform the judge that, upon rereading rule 19, he believed that the judge had applied the incorrect standard in denying the motion to waive jury trial. Although the transcript contains gaps, it appears that the gist of defense counsel's argument was that the defendant did not have the onus of establishing good cause for the request, but rather that the judge could not deny the request without good cause to do so. The judge responded, "Okay, all right. It's on the record, still denied." The process of empanelling the jury then began, and the short trial followed.

Discussion. "The right to a jury trial is a fundamental right guaranteed to a criminal defendant in order to preserve a fair trial." Commonwealth v. Dietrich, 381 Mass. 458, 460 (1980). However, provided that the decision is made voluntarily and intelligently, a defendant may decide to waive the right to be tried before a jury. G. L. c. 263, § 6.⁵ See Ciummei v.

⁵ "Any defendant in a criminal case other than a capital case, whether begun by indictment or upon complaint, may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him upon such indictment or

Commonwealth, 378 Mass. 504, 509 (1979). "That decision 'is primarily a decision regarding trial strategy'" (quotation omitted). Commonwealth v. Kopsala, 58 Mass. App. Ct. 387, 391 (2003), quoting Dietrich, 381 Mass. at 461. Although the defendant is entitled to the advice of competent counsel with respect to the decision, ultimately the decision to waive trial by jury belongs to the defendant alone. See Commonwealth v. Duarte, 477 Mass. 630, 638-639 (2017), cert. denied, 138 S. Ct. 1561 (2018). See also Jones v. Barnes, 463 U.S. 745, 751 (1983) (accused has ultimate authority to make fundamental decision whether to waive jury trial); Commonwealth v. Pavao, 423 Mass. 798, 803 (1996) (same). "In the end, the defendant must make an over-all estimate as to where he will fare better, before a judge or before a jury. If he goes to trial, he will presumably prefer to go to trial in the forum where he thinks his chances will be best." Dietrich, 381 Mass. at 461-462, quoting H. Kalven & H. Zeisel, *The American Jury* 28 (1966).

complaint, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court." G. L. c. 263, § 6. There are, however, certain limits to this entitlement. For example, the statute does not apply to defendants facing capital charges. It also requires that all defendants charged with related offenses must make the waiver election before a jury has been empanelled in any one of their cases. G. L. c. 263, § 6.

The defendant may make his or her election to waive a jury trial at any time before the jury has been empanelled.⁶ G. L. c. 263, § 6. See Commonwealth v. Collado, 426 Mass. 675, 677 (1998).⁷ If the election is timely and in writing,⁸ see Mass. R. Crim. P. 19 (a), 378 Mass. 888 (1979), then the judge is to conduct a colloquy to determine whether the waiver is voluntary and knowing. Id. See Ciummei, 378 Mass. at 509. "The colloquy provides a check that defense counsel has done his duty in discussing the choice with the defendant and that the defendant has participated in and comprehends the decision to waive the

⁶ Consistent with this, Dist. Ct. Supp. R. Crim. P. 10 (1987), which applies to criminal cases in Essex County as well as those in Hampden County (where this case was brought), provides that "[i]n the jury session, the defendant shall decide whether or not he or she will waive the right to jury trial no later than the commencement of trial." "[C]ommencement of trial" for these purposes should be read to refer to empanelment of the jury. This reading brings Dist. Ct. Supp. R. Crim. P. 10 in harmony with G. L. c. 263, § 6, and Mass. R. Crim. P. 19 (a). It also is consistent with the rule that "[i]n the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." Lupi v. Commonwealth, 434 Mass. 1018, 1018 (2001), quoting Serfass v. United States, 420 U.S. 377, 388 (1975).

⁷ If the case is in the Boston Municipal Court or, as it was here, in the District Court, "consent to said waiver shall not be denied . . . if the waiver is filed before the case is transferred for jury trial to the appropriate jury session." G. L. c. 263, § 6. Because this case had been transferred to a jury session by the time the defendant filed her motion, it did not fall within this provision of the statute.

⁸ In the District Court, the written waiver must be on a preprinted form, and be accompanied by a certificate of counsel. See G. L. c. 218, § 26A; Dist./Mun. Cts. R. Crim. P. 4 (e).

jury." Pavao, 423 Mass. at 804. Among other things, "[t]he judge should make sure that the defendant has conferred with his counsel about the waiver, and that he has not been pressured or cajoled and is not intoxicated or otherwise rendered incapable of rational judgment." Ciummei, 378 Mass. at 510. Commonwealth v. Hernandez, 42 Mass. App. Ct. 780, 784 (1997). But the judge should not inquire into the reasons for the defendant's tactical decision to waive a jury. "It is not the purpose of the colloquy to probe the defendant's understanding of the strength or weakness of the Commonwealth's case or the reasons why the defendant made the tactical decision to waive the jury." Kopsala, 58 Mass. App. Ct. at 391. Nor, as the judge here mistakenly thought, does the defendant need to show good cause for the choice. The focus of the judge's inquiry is only to determine whether the waiver is knowing and voluntary.

This is not to say that the judge is required in all circumstances to accept a defendant's waiver. A judge "may refuse to approve such a waiver for any good and sufficient reason provided that such refusal is given in open court and on the record." Mass. R. Crim. P. 19 (a). In Commonwealth v. Collins, 11 Mass. App. Ct. 126 (1981), where we reversed the convictions on other grounds, we stated that the judge did not err in denying the defendant's motion to waive a jury trial given the "judge's conclusion that certain pretrial matters

which came to his attention, including statements of defense counsel, would unfairly prejudice, at least in appearance, the rights of the defendant." Id. at 141. In that circumstance -- where there was an apparent risk that the waiver would unfairly prejudice the defendant -- we concluded that the trial judge did not err in denying the defendant's waiver.

No such circumstance is presented here. Instead, the judge's stated reason for denying the waiver was to avoid "the appearance or the inkling of judge shopping."⁹ "Judge shopping" is commonly understood to refer to the use of litigation tactics that are designed to steer a case towards a different judge who is perceived to be more favorable to one's cause. See

⁹ The judge may have used the term "judge shopping" to mean that the defendant was choosing to waive trial by jury because of the identity of the trial judge. Although neither party has cited to it, we recognize that the Working Group Report, supra at 35, suggests that "a waiver of trial by jury should not be permitted when it appears that the basis is the identity of the particular judge who would try the case." However, that sentence should not be read to mean that a defendant can waive the right to trial by jury only when he or she remains in a state of ignorance as to who the trial judge might be. Not only would such a reading be impracticable, its application would run afoul of G. L. c. 263, § 6, which, as we have noted above, permits waiver up until a jury has been empanelled. Similarly, consistent with the statute, the statement cannot be read to curtail the defendant's ability to make a tactical decision as to whether the case would be better tried before the current judge rather than a jury. Instead, that portion of the report should be understood to refer to judge shopping as we have described it here, that is, when it appears that the defendant has manipulated the process to get to a particular judge.

Commonwealth v. Pagan, 445 Mass. 315, 321 (2005); Demoulas v. Demoulas, 432 Mass. 43, 53 (2000); Commonwealth v. Morgan RV Resorts, LLC, 84 Mass. App. Ct. 1, 15 (2013). The decision to have one's case decided by a judge rather than by a jury -- standing alone (as it does here) -- is not judge shopping. There is no suggestion in the record that the defendant's waiver here would have caused the case to be transferred to another judge, let alone to a specific judge the defendant preferred.¹⁰ Nor is there anything in the record to suggest that the defendant steered the case to this particular trial judge. Instead, the record merely shows that the defendant sought to waive trial by jury on the first day of trial, with a judge she had done nothing in particular to get her case in front of. Such a scenario does not constitute good cause to reject a waiver of jury trial.

In short, the judge erred in denying the defendant's motion to waive trial by jury in the absence of good cause to reject the waiver. This leads us to the question of the appropriate remedy for the error. Cases involving errors arising from jury waivers are rare, and we have found only two cases discussing the appropriate remedy. In Pavao, the Supreme Judicial Court

¹⁰ The Commonwealth confirmed at oral argument that the defendant's waiver would not have caused the case to be decided by a different judge.

concluded that the failure to conduct a jury-waiver colloquy mandated reversal and that a harmless error analysis was inappropriate. The court stated that "the failure of the judge to conduct a colloquy cannot be overcome by the claim that the error was harmless where in a particular case there can be little doubt that a jury would have reached the same conclusion as the judge." Pavao, 423 Mass. at 804. In Collado, the trial judge erroneously allowed the defendant's motion to waive a jury trial, even though it violated rule 19 in two respects. First, the motion was untimely because it was made after the "empanelment process had begun." Collado, 426 Mass. at 676. Second, the moving defendant was not the only defendant in the case, and the codefendant did not waive his right to a jury. Apparently unaware of the requirements of G. L. c. 263, § 6, or rule 19 (a), the judge allowed the untimely motion after empanelment concluded, and conducted a hybrid bench/jury trial. Collado, 426 Mass. at 676. Considering these errors to be procedural, the court held that "an unintentional violation of either G. L. c. 263, § 6, or rule 19 (a) will result in reversal only if the defendant can show a substantial risk of a miscarriage of justice." Collado, 426 Mass. at 678.

This case falls closer to the type of substantive error in Pavao than to the procedural missteps in Collado. The defendant's motion was procedurally correct: it was timely made

on the required court form, and properly supported by counsel's certificate. See note 3, supra. The error here stems from the judge's mistaken view that the defendant was required to show good cause for her decision. In addition, the errors in Collado resulted in the erroneous allowance of the defendant's requested waiver; here the errors resulted in the erroneous denial of the defendant's motion. Thus, as in Pavao, we conclude that reversal is required.

Finally, we reject the defendant's argument that the evidence was insufficient to prove beyond a reasonable doubt that the chair as used was a dangerous weapon. Viewed in the "light most favorable to the Commonwealth," Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the evidence permitted the jury to find that the defendant swung a plastic chair and struck her husband on the arm, "opened up" his left wrist, and caused an abrasion measuring approximately one inch by two and one-half inches. The injury bled profusely because the husband was on blood-thinning medication, and took more than ten days to heal. Considering the "nature and specific features of the object," "the circumstances surrounding the assault and the use of the object, and the manner in which it was handled or controlled," Commonwealth v. Rosa, 94 Mass. App. Ct. 458, 464 (2018), quoting Commonwealth v. Marrero, 19 Mass. App. Ct. 921, 922 (1984), the jury could permissibly conclude that the chair,

as used, was capable of producing serious bodily injury and, as such, was dangerous. Rosa, 94 Mass. App. Ct. at 463-464.

Judgment vacated.

Verdict set aside.